In the

United States Court of Appeals

For the Ninth Circuit

No. 21168

LOGAN LANES, INC., AN IDAHO CORPORATION,
Plaintiff-Appellant,

vs.

BRUNSWICK CORPORATION, A DELAWARE CORPORATION,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, EASTERN DIVISION.

BRIEF OF APPELLEE.

LOUIS F. RACINE, JR.,
RACINE, HUNTLEY & OLSON,
Center Plaza Building,
Pocatello, Idaho,

ROBERT L. STERN,
MILES G. SEELEY,
NED ROBERTSON,
MARTIN WALD,
MAYER, FRIEDLICH, SPIESS, TIERNEY,
BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois,
Attorneys for Defendant-Appellee.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, EASTERN DIVISION.

BRIEF OF APPELLEE.

STATEMENT OF FACTS.

This is a suit for treble damages for alleged violation of the Robinson-Patman Act (Sec. 2(a) of the Clayton Act, as amended) (15 USC §§ 13 and 15). It arises from an alleged sale of bowling lanes by defendant to Utah State University, at lower prices than plaintiff paid to defendant for similar lanes.

The Trial Court sustained defendant's motion for summary judgment ruling that (1) the Robinson-Patman Act does not apply where the purchaser obtaining the lower

price was the sovereign State of Utah, and (2) that, in any event, the purchase by Utah State University was exempt from the Robinson-Patman Act by virtue of § 13c thereof, because it was a sale to an educational institution. (R. 98-103.)

On October 5, 1959 defendant sold to plaintiff, for installation in Logan, Utah, 16 bowling lanes, pinsetters and related equipment for $212,051.63. In the fall of 1963 additional bowling equipment was purchased by plaintiff from defendant. (R. 48.)

On March 17, 1964, defendant entered into a contract with the Utah State Building Board, a state instrumentality, for the installation of 10 bowling lanes, pinsetters and related equipment in the Student Union Building, Utah State University, at Logan, Utah. The price paid by the University for the equipment was $81,118.56. (R. 73, 80-82.)

Commencing in June, 1964, the University incorporated the bowling lanes into its physical education program. Approximately 900 to 1,000 students annually enroll in bowling classes, receiving credit for such participation. (R. 92, 94, 96.) In addition, the bowling lanes provide extracurricular recreation for students and faculty. (R. 92.) Limited use of the bowling lanes by the general public is permitted. (R. 94.) All income derived from the use of the bowling lanes is used to finance either student activity programs or dormitory and Union Building expansion and improvement. (R. 93.) None of the bowling equipment purchased by the University from defendant included resalable products. (R. 94, 95.)

A. Utah State University.

Article X, Sec. 1 of the Utah Constitution provides that the legislature is to establish and maintain a system of public schools. Article X, Sec. 2 defines public schools to include ". . . an agricultural college" (formerly called Utah State University of Agriculture and Applied Science).

The government of Utah State University ". . . and the management of its property and affairs" is vested in a board of trustees made up of the Secretary of State, president of the alumni association and twelve citizens appointed by the governor with the consent of the senate (Section 53, Chapter 10-9, Utah Statutes). By virtue of 53-38-1, the board of trustees of Utah State University is authorized to set aside property for:

> ". . . dormitories, kitchens, dining halls, auditoriums, student union buildings, field houses, stadiums, general library buildings, parking lots, parking structures, other self-liquidating projects, and other revenue producing buildings including additions to and remodeling of existing buildings used for such purposes and to construct such buildings or additions thereon and to equip, furnish, maintain and operate such buildings."

Furthermore, 53-34-6 directs:

> ". . . that all sums received by said institutions as a result of the operation by said institutions of bookstores, printing presses, cafeterias, dining halls, dormitories, parking lots, parking structures, or as a result of engaging in any other proprietary activities may be retained by said institutions, and said institutions may make disbursements therefrom for the payment of current bills arising in the course of said proprietary activities, . . ."

The Board of Trustees has been given specific statutory authority to construct and operate a Student Union Building under the supervision and direction of the Utah State Building Board. (53-38-1.)

B. Utah State Building Board.

The Utah State Building Board was created by the Utah Legislature to ". . . carry out the building and expansion program of the State provided by law, . . ." [63-10-7]. Its five members are appointed by the Governor with the advice and consent of the Utah Senate [63-10-1].

Section 63-10-7, confers upon the Board the following powers and authority:

1. to supervise preparation of designs, plans and specifications relating to the construction or modification of State buildings;
2. To enter into contracts necessary to the performance of the duties of the Board; in this connection the Board, except in certain cases not here relevant, is required to award any contract ". . . to the lowest bidder who in the judgment of the board is responsible and qualified to do the work. The judgment of the Board as to the responsibility and qualifications of such bidders shall be conclusive, except in case of fraud or bad faith" [63-10-7(7)];
3. "To do any and all things which in its judgment may be necessary or proper for carrying out any of the purposes of this chapter, including the making of necessary and proper expenditures, with the approval of the Governor, of State money; . . ." [63-10-7(19)].

In the performance of its statutory duties, the acts of the Board are the acts of the sovereign. *Nuttall* v. *Berntson*, 88 U. 535, 30 P. 2d 738, 742; *Utah State Building Comm. for Use and Benefit of Mountain States Supply Co.* v. *Great American Indemnity Co., et al.*, 105 U. 11, 140 P. 2d 763.

QUESTIONS PRESENTED.

There is a considerable amount of overlapping among the 12 errors specified by the plaintiff. In addition, to analyze and distinguish all of the 113 cases cited by plaintiff would leave little space to set forth the reasons why the Trial Court correctly granted defendant's Motion for Summary Judgment. Therefore, defendant will recast the questions presented on this appeal and demonstrate the correctness of the Trial Court's opinion. Two substantive questions are presented:

1. Does § 2 (a) of the Robinson-Patman Act apply where the buyer granted the lower price is the State of Utah?

2. Does § 13c of the Robinson-Patman Act exempt the sale, in any event, because the beneficial purchaser is a university? Part of this question is whether the exemption has been lost because the university permits the general public to use its bowling lanes to a limited extent.

The Trial Court ruled for the defendant on both of these questions. If either ground for the Trial Court's ruling is correct, the other is moot. In addition, two procedural questions are presented:

1. Did defendant's Motion for Extension of Time filed on March 7, 1966 (R. 36) comply with Local Rule 7 of the District Court of Idaho, since no brief was filed in support of the motion?

2. Did the Trial Court's refusal to require defendant to answer plaintiff's interrogatories deprive plaintiff of an opportunity to demonstrate the existence of a material issue of fact?

ARGUMENT.

I. THE STATUTORY BASIS FOR THE CAUSE OF ACTION.

Plaintiff's brief asserts that its claims arise from §§ 2(c), 2(d) and 2(e) of the Robinson-Patman Act. However, no violation of any of those sections is alleged in plaintiff's complaint or in its Specification of Errors in this Court and plaintiff's argument fails to indicate what relevancy those sections have except as they indicate that the general purpose of the Act was to forbid discrimination. For this reason, we confine our discussion to Sec. 2(a), which is the real basis of the plaintiff's claim.

II. THE TRIAL COURT CORRECTLY HELD THAT § 2(a) OF THE ROBINSON-PATMAN ACT DOES NOT BAR THE GRANTING OF A LOWER PRICE TO THE STATE OF UTAH.

The defendant asserts that the Trial Court clearly was correct in its ruling and that its decision is supported by decision law, by administrative interpretation and practice and by legislative history.

Specification of Error No. 6 provides in part, "the trial court erred in holding the sales of Appellee and the transactions sued upon immune from an action under the Robinson-Patman Act." (Plaintiff's Brief, p. 14.)

The basis upon which defendant submits that § 2(a) of the Robinson-Patman Act is inapplicable to a situation in which a sovereign is granted a lower price than other customers of the seller is found in the collective action, or inaction, of all three branches of the Federal Government. Each has played a significant part in developing the law concerning the application of the Robinson-Patman Act to

governmental purchases. A review of the history of that collective action, or inaction, requires the conclusion that this Court in *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.*, 351 F. 2d 851 (C. A. 9, 1965), *cert. den.* 383 U. S. 936, anticipated the correctness of the ruling made by the Trial Court in the instant case.

A. The Sovereign Exemption Doctrine[1] and Its Application to Antitrust Decisions.

One of the earliest and most widely cited opinions dealing with the sovereign exemption doctrine is *United States* v. *Hoar*, 26 Fed. Cas. 329 (D. Mass. 1821). The court stated (26 Fed. Cas. 330):

> "Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the prin-

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1. 3 Sutherland, *Statutory Construction*, 183, 191 (3rd ed. 1943):

> "General words or language of a statute that tends to injuriously encroach upon the affairs of the government receive a strict interpretation favorable to the public, and, in the absence of express provision or necessary implication, the sovereign remains unaffected. (Citations omitted.)
>
> * * * * *
>
> "Since the rule is founded on the policy of preserving government from the *injurious* consequences of a statute, the validity of the rule is destroyed where a statute offers a benefit or privilege."

> ciples of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

Court decisions sustaining the doctrine span 140 years. *The Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239; *United States* v. *United Mine Workers of America*, 330 U. S. 258, 272-3; *United States* v. *Wittek*, 337 U. S. 346, 359; *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U. S. 99, 120.

Plaintiff erroneously contends that the sovereign exemption doctrine excludes from the coverage of a statute only the *enacting* sovereign. No cases are cited in support of this contention. The contrary is held by at least six decisions which have held that the *federal* antitrust laws do not apply to *state* action. *Olsen* v. *Smith*, 195 U. S. 332; *Parker* v. *Brown*, 317 U. S. 341; *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F. 2d 52 (C. A. 1, 1966), cert. applied for September 12, 1966; *Lowenstein* v. *Evans*, 69 F. 908 (D. S. C. 1895); *General Shale Products Corp.* v. *Struck Construction Co.*,[2] *et al.*, 37 F. Supp. 598 (W. D. Ky. 1941), aff'd on other grounds 132 F. 2d 425 (C. A. 6, 1942), cert. den. 318 U. S. 780; *Sachs* v. *Brown-Forman Distillers Corp.*,[2] 134 F. Supp. 9 (S. D. N. Y. 1955), aff'd per curiam 234 F. 2d 959 (C. A. 2, 1956).

Examination of the facts and the Court's ruling in *Parker* v. *Brown* and *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority, supra*, refutes plaintiff's further contention that the sovereign exemption doctrine exempts only the sovereign and not the private party engaged in dealing with the sovereign. These cases conclusively show that *the sovereign exemption doctrine applies to the transaction to which the sovereign is a party.*

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2. Cited by this Court in *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.*, 351 F. 2d 851 (C. A. 9, 1965), *cert. den.* 383 U. S. 936.

Parker v. *Brown,* 317 U. S. 341, involved, in part, the issue of whether the Sherman Antitrust Act, 15 U. S. C. § 1, barred the promulgation of restrictive marketing plans relating to production of agricultural commodities pursuant to an act of the California legislature. The purpose of the legislation was to ". . . restrict competition among the growers and maintain prices . . ." obtained by the growers in the sale of their products (317 U. S. 346). The court assumed that if the growers had initiated and effectuated an identical plan in the absence of the California Agricultural Prorate Act, a violation of the Sherman Act would have resulted (317 U. S. 350)—that is, price fixing and agreements among competitors to limit production.

Section 1 of the Sherman Act, like § 2(a) of the Robinson-Patman Act, is an all-inclusive statute on its face and contains no qualification that its provisions are not applicable to any state or to private parties engaged in transactions with a state. The statute reads (15 U. S. C. § 1):

> "*Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal . . ." (Emphasis supplied.)

The sovereign exemption doctrine was the basis for the Supreme Court's decision (317 U. S. 350-351):

> "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from

> their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state . . .
>
> "There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.' 21 Cong. Rec. 2562, 2457; see also 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history." (Citing cases.)

The analogy between appropriate state action involving agricultural products and education is apparent. Likewise obvious is the fact that the officers and agents of the State of Utah, in dealing with defendant, acted lawfully pursuant to the direction of the Utah legislature no less than did the officers and agents of the State of California pursuant to its legislature. Therefore, just as the participation of the State of California in the Prorate Program insulated the private growers from liability for fixing prices and allocating production—so the defendant here is insulated from liability under § 2(a) of the Robinson-Patman Act where the State of Utah participated in the very transaction under attack.

Wiggins Airways, Inc. v. *Massachusetts Port Authority*, 362 F. 2d 52 (C. A. 1, 1966), cert. applied for September 12, 1966, involved a suit for treble damages and injunctive relief against a governmental agency and two private parties. The Port Authority took over control of the Boston Airport and entered into an exclusive contract with one of the defendants whereby the latter would operate the airport through a subsidiary, also named as a defendant. The complaint alleged that the exclusive contract represented

a conspiracy, combination or contract in restraint of trade, thereby violating Section 1 of the Sherman Act. The Trial Court dismissed the suit on the grounds that the complaint failed to state a cause of action.

The Court of Appeals affirmed after finding that the Port Authority is ". . . a public instrumentality . . ." and that it performs ". . . an essential governmental function." (362 F. 2d 52.) That finding was the basis for application of the sovereign exemption doctrine enunciated in *Parker* v. *Brown* (362 F. 2d 55-56):

> ". . . What was done here was in the exercise of a valid governmental function. The antitrust laws are aimed at *private* action, not at governmental action. As stated by the Supreme Court in *Parker* v. *Brown*, 317 U. S. 341, 350-351, 63 S. Ct. 307, 313, 87 L. ed. 315 (1943):
>
> 'We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . .'."

The private parties named in the lawsuit as defendants raised the defense that ". . . the only conduct alleged against them is in connection with the Authority's exercise of a governmental function which is not subject to the antitrust laws." (362 F. 2d 55, fn. 10.) The Court of Appeals concluded that it was not necessary for it to pass on this defense. The court stated (362 F. 2d 56):

> ". . . it should be noted that the only conduct of the defendants, Butler or Butler-Boston, alleged to have been in violation of the antitrust laws had to do with their dealings with the Authority in the exercise of a governmental function. *If, as we have found, the Authority's conduct was lawful here it would be an unreasonable restriction on its freedom to hold that the*

> *other defendants acted illegally in having aided it.*" (Emphasis supplied.)

The relevancy of *Wiggins* to this case is clear and convincing. The sovereign exemption doctrine insulates from antitrust liability any state and private parties dealing with it when the state is engaged in carrying out its statutory powers.

Moreover, *Wiggins* contradicts plaintiff's argument that the rationale of *Parker* v. *Brown* has been dissipated by time. *Wiggins* was decided on June 15, 1966.

Plaintiff urges that the power of Congress over interstate commerce under the Sherman Act, at the time of the decision in *Parker* v. *Brown,* was "more restricted than presently viewed," by the Supreme Court. (Plaintiff's Brief, p. 46.) *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127, a 1962 decision, is directly contrary to plaintiff's argument. In connection with the power of Congress over interstate commerce under the Sherman Act, the Court unanimously stated, citing *Parker* v. *Brown* (365 U. S. 135-36):

> "It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co.* v. *United States*, that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.' Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out."

See also fn. 17 citing with approval *Parker* v. *Brown* (365 U. S. 137).

In summary, *Parker* v. *Brown* and *Wiggins Airways, Inc.* v. *Massachusetts Port Authority, supra,* hold that: (1) the sovereign exemption doctrine applies to the anti-

trust laws of the United States notwithstanding that the sovereign is a state; (2) the sovereign exemption doctrine applies to the transaction to which a sovereign is a party; (3) the sovereign exemption doctrine is to be applied so as to not allow antitrust suits to obstruct or hinder a sovereign in carrying out its lawful activities.

No seller would offer a sovereign a government discount were the Robinson-Patman Act to be inapplicable only to the buyer. The threat of treble damage actions would, for most sellers, eliminate government discounts from seller's price lists. Depriving a sovereign of the right to obtain goods at the lowest possible price "would be an unreasonable restriction on its freedom . . ." (362 F. 2d 56).

Although not squarely deciding the point which is now before this Court, in *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.*, 351 F. 2d 851 (C. A. 9, 1965), *cert. den.* 383 U. S. 936, this Court had occasion to comment on the general question of whether the Robinson-Patman Act applies to sales to the State of Idaho. This Court stated (at 858-9):

> "Defendants also argue, with regard to the general applicability of Section 2(c), that sales to a sovereign are excluded, and hence payments made to Grimes in connection with Rangen's sales to the State of Idaho are not covered by that subsection. Several district courts have apparently so ruled, on the theory that such an exemption is required by the policy which allows the sovereign to buy at the best price obtainable. (Citing cases.)
>
> "Assuming that there is such a policy and that it gives rise to such an exemption in an appropriate case, it has no room to operate here. Idaho was the victim, not the beneficiary, of the transactions here in question. It paid more than should have, instead of less. Under the circumstances of this case, enforcement of section 2(c) will serve, rather than defeat, the as-

> serted policy, by discouraging bribery of state officials."

We have shown above that the policy which this Court, in the *Rangen* case, noted as the holding of "several district courts," stems in fact from a principle of law long adhered to by the Supreme Court and other reviewing courts.

The circumstances which made the doctrine inoperable in the *Rangen* case are not, of course, present in this case.

B. Administrative Interpretation.

In April, 1936 the Attorney General of the United States rendered an opinion that bears heavily on the application of the sovereign exemption doctrine to the Robinson-Patman Act. The Secretary of War requested an opinion from the Attorney General as to whether motor contract carriers, subject to regulation by the Interstate Commerce Commission, could legally quote rates to the Government that were lower than the rates on file with the I. C. C. The section under consideration, § 218 of the Motor Carrier Act, contained an outright prohibition against charging or collecting a rate less than the applicable rate on file with the I. C. C. Thus, the Attorney General was confronted with a statute that on its face appeared to be all encompassing and without exception and, therefore, a limitation on the Government obtaining lower rates.

In holding that § 218 did not bar the granting of rates to the Government lower than the rates on file with the I. C. C. the Attorney General first invoked the sovereign exemption doctrine,[3] (38 Op. 452, 453):

> "If section 218 of the Motor Carrier Act is binding on the Government, it deprives the Government of a

3. For the convenience of the Court, the opinion is attached to this brief as Appendix A.

> right, namely: *the right to contract with contract carriers by motor vehicle for transportation at the lowest possible rate.*" (Emphasis supplied.)

Moreover, the Attorney General ruled that the purpose of the Motor Carrier Act was to regulate motor carriers so as to protect commerce and to prevent "discriminations" which would result in improper advantages and "destructive competitive practices." (38 Op. 455.) These purposes could be carried out and still permit the charging of lower preferential rates to the Government, according to the Attorney General.

This opinion by the Attorney General invoked the sovereign exemption doctrine based upon the fact that the government was entitled to the lowest price it could obtain from a carrier. It was his view that the purpose of the Motor Carrier Act was not in conflict with the right of the sovereign to obtain transportation as economically as possible.

The Attorney General's opinion as to controlling public policy was rendered in the light of his certain realization of the provisions of the Clayton Act as then in force.

In 1914 Congress enacted the Clayton Act, 15 U. S. C. § 13. Section 2 of that Act provided:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce, ..."

It must be assumed, therefore, that the Attorney General did not believe that by § 2 of the Clayton Act, Congress had legislated a different policy as to sovereign exemption than it applied to the Motor Carrier Act.

Two months after the Attorney General rendered the opinion to the Secretary of War concerning the Motor Carrier Act, Congress passed the Robinson-Patman Act as an amendment to the Clayton Act. § 2(a) amended § 2 of the Clayton Act and provided, in part (15 USC § 13(a)):

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . . ."

Six months after the passage of the Robinson-Patman Act, the Attorney General of the United States was requested to render an opinion ". . . concerning the application of the Robinson-Patman Act . . . to government contracts for supplies."[4] In holding that the Act did not apply to purchases by the Government, the Attorney General relied on three basic propositions (38 Ops. 539):

1. His opinion of April 20, 1936, Appendix A, had demonstrated that statutes regulating rates, etc.,

4. For the convenience of the Court, the opinion is attached to this brief as Appendix B.

do not "... ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of Congress to make such statutes applicable to the Government."

2. The Robinson-Patman Act, in amending the Clayton Act, did not add language to the statute which had any bearing on the question propounded by the Secretary of War. During the twenty-two years between the enactment of the Clayton Act price discrimination proviso and the passage of the Robinson-Patman Act, the Attorney General was unable to find any authority for the proposition that § 2 of the Clayton Act applied to sales to the government.
3. While the Clayton Act was in effect it was a known custom of the trade "... for those dealing with the various agencies of the Federal Government to grant to them special prices on contracts for supplies. Such prices are often below the regular market for similar material supplied to the regular trade. ..."

In conclusion, the Attorney General stated that he felt obligated to render an opinion thereby (38 Op. 540):

> "... avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters, in the absence of any clear indication that it intended to depart from that policy in this instance."

The views expressed by the Attorney General were consistent with the purpose for which the Robinson-Patman Act was enacted. In 1936 Congress was not concerned with sovereigns obtaining preferential pricing. During that time the state of the economy which resulted in expanded government activity, both at the state and federal level, belies any contention that Congress viewed with alarm the

commercial custom of granting lower prices to government. Rather, the Robinson-Patman Act was intended to combat the growing influence of the chain store organization which used its buying power to extract from suppliers price concessions that permitted the chain stores to underprice independent competitors. *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U. S. 166, 168; *Federal Trade Commission* v. *Sun Oil Co.*, 371 U. S. 505, 516.

The contemporaneous opinion of the Attorney General that the sovereign exemption doctrine applied to the Robinson-Patman Act is entitled to great weight since the Attorney General shares concurrent jurisdiction to enforce the Act. *Power Reactor Development Co.* v. *International Union of Electrical, Radio & Machine Workers, AFL-CIO, et al.*, 367 U. S. 396, 408; *Zemel* v. *Rusk, Secretary of State, et al.*, 381 U. S. 1, 11.

C. Legislative History.

Congressional debates on the Robinson-Patman Act give no clue as to whether the Act was intended to apply to the federal and state governments so as to nullify the sovereign exemption doctrine. However, during hearings on the bill, a colloquy did take place between members of the Committee and the chief lobbyist for the bill, Mr. Teegarden.[5]

The colloquy, *Hearings before the House Committee of the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. 208-9, 1935*, conclusively demonstrates that Congressmen Lloyd, Hancock and Michener were aware that the government obtained goods at prices lower than other buyers and that they were concerned that the proposed bill might be construed to apply to government purchases. The concern they expressed was not limited to the United

5. For the convenience of the Court, the colloquy is attached to this brief as Appendix C.

States but included states, cities and municipalities as well.

The colloquy also shows that the Congressmen did not place any significance on what the purchasing sovereign might subsequently do with the goods. Their concern related solely to the possible effect of the Act on the purchase itself.

Following his testimony, Mr. Teegarden submitted a brief to the House Judiciary Committee. The brief demonstrates that in view of the concern voiced by the Congressmen that the Act might be construed to apply to purchases by federal, state and local governments, Mr. Teegarden deemed it advisable to silence the concern by referring to the sovereign exemption doctrine (Hearings, 74th Cong. 1st Sess. *supra* at 250):

> "2. Would the bill prevent competitive bidding on Government purchases *below trade price levels?*
>
> "This question was raised by a member of the committee at the hearing. The answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law (citing cases).
>
> "The futher insertion of the clause proposed under topic 4 below, requiring: a showing effect upon competition, will further preclude any possibility of the bill affecting the Government." (Emphasis supplied.)

The silence of Congress—its failure to embody any provisions in § 2 of the Robinson-Patman Act which would make inapplicable to it the long-established doctrine of sovereign exemption, after that doctrine had been specifically brought to its attention, is a very significant fact of legislative history.

In *United States* v. *United Mine Workers of America,* 330

U. S. 258, the question was whether the United States was entitled to an injunction against defendant union in view of the fact that § 13 of the Norris-LaGuardia Act, on its face, appeared to prohibit such relief. The sovereign exemption doctrine and inaction by Congress were held to be the means by which the court would construe § 13 (330 U. S. 272-3):

> "... There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect. It has been stated, in cases in which there were extraneous and affirmative reasons for believing that the sovereign should also be deemed subject to a restrictive statute, that this rule was a rule of construction only. Though that may be true, the rule has been invoked successfully in cases so closely similar to the present one, and the statement of the rule in those cases has been so explicit, that we are inclined to give it much weight here. *Congress was not ignorant of the rule which those cases reiterated; and, with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use 'clear and specific* [*language*] *to that effect' if it actually intended to reach the Government in all cases.*" (Emphasis supplied and footnotes omitted.)

Nor can the continued non-action of Congress on this point after 1936 be attributed to mere oversight or inattention. Twice thereafter Congress was asked to amend the Robinson-Patman Act so that *it would forbid granting discriminatory prices to the United States government or any state or political subdivision.*

In 1951 and again in 1953, Congressman Patman, one of the co-sponsors of the 1936 legislation, introduced such bills, as H. R. 4452 (82nd Cong., 1st Sess.) and H. R. 3377 (83rd Cong., 1st Sess.). Both bills were referred to the Judiciary Committee and died there.

We submit that the non-passage of H. R. 4452 and H. R. 3377, following the implicit incorporation by Congress of

the doctrine of sovereign exemption when the Robinson-Patman Act was enacted, conclusively establishes, under the rule in the *United Mine Workers* case that sovereign exemption is in fact incorporated in § 2(a).

III. THE TRIAL COURT CORRECTLY HELD THAT THE PURCHASE BY UTAH STATE UNIVERSITY FROM DEFENDANT WAS WITHIN THE NON-PROFIT INSTITUTION EXEMPTION OF 15 U. S. C. § 13c.

The Trial Court ruled, as an alternative ground for granting defendant's Motion for Summary Judgment, that Utah State University was a ". . . university . . ." within the meaning of 15 U. S. C. § 13c, thereby exempting the purchase of bowling lanes, pinsetters and related equipment made by the University from defendant. (R. 102.)

The statute provides:

> "Nothing in sections 13-13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

Since we have shown (*supra*, pp. 3, 4) that the University was empowered to construct and operate a student union, and since, under the statutes of Utah, the mechanics of such a project were that the Utah State Building Board was to contract for the building for the University, it would be a strained and artificial construction of Sec. 13c to contend that within its intent and purpose the sale in this case was not a sale to the University.

The Utah State Building Board did not sell or convey the student union building to the University—it simply turned it over to the University after completion and acceptance by it. (R. 79.) In effect, the Board was simply the purchasing and building agency for the University. Both of them were, therefore, the State of Utah.

Student Book Company v. *Washington Law Book Company,* 232 F. 2d 49 (C. A. D. C. 1955), *cert. den.,* 350 U. S. 988, is the only court decision that has passed on the meaning of § 13c.

That case involved an alleged price discrimination by defendant in selling law books to the plaintiff at a higher price than defendant charged certain university book stores who competed with plaintiff. Defendant asserted § 13c as a defense to the action. The Court rejected the application of § 13c on the basis of the fact that the books were sold to the competing book stores for subsequent sale at a profit. The Court stated (232 F. 2d 50-51, fn. 5):

> "Appellee also argues that, even if its transactions with the campus book stores were sales, they were exempted from the application of the Robinson-Patman Act by virtue of 52 Stat. 446, 15 U. S. C. § 13c, which provides:
>
> > 'Nothing in sections 13-13b * * * of this title shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.'
>
> "Although the appellee has sold books to all three of the universities *for their own use, i. e., for their libraries,* the transactions here in question were not actually with the universities, but with the self-sustaining campus book stores, and *the books sold were not for the use of the universities, but for resale at a profit.* The exemption provision is therefore inapplicable to these transactions." (Emphasis supplied.)

The rationale of the Court's opinion is clear. When a university, or other named type of non-profit institution, purchases commodities for the purpose of resale, with the intent of becoming a competitor in the public market, it cannot be said to have purchased for its own *use.*

In this case, however, it is uncontroverted that the bowling alleys in the student union were *used* as part of the University's physical education program and were also *used* as recreational facilities for the students and faculty. They also were *used,* by the University, to a minor extent, for public bowling; that is, less than 2.3%. (R. 94.) They never were sold or otherwise placed in the control of anyone else.

A state university is not a cloister in which students and faculty are sealed off from the life of the community. It would gravely inhibit the usefulness and public service of such an institution to hold that it forfeited the exemption extended by Congress if it *used* its property, even to a limited extent, for the benefit of the taxpayers who supported it.

Defendant submits that the affidavits of Dee A. Broadbent (R. 92-93) and Evan Stevenson (R. 94-95) conclusively show that the bowling lanes were not operated in a manner so as to personally benefit any person. To the contrary, once revenues were used to pay expenses, any excess moneys were used for student activity programs or University building projects.

Plaintiff argues that Sec. 13c does not apply here because the student union received income and, perhaps, realized a profit, on its public bowling. This, it is claimed, takes it out of the category of institutions "not-for-profit".

This argument flies in the face of common understanding of what a corporation "not-for-profit" is. Such an institution is one which distributes no earnings to its stockholders or others. The fact that some phase of its operations may be profitable, the profit being used to support the institution as a whole, does not make it any less an institution "not-for-profit".

The Trial Court correctly interpreted the language in

§ 13c as it applied to the purchase by Utah State University of bowling equipment from defendant. The ruling of the Trial Court should be sustained.

IV. THE TRIAL COURT WAS CORRECT IN FINDING THAT DEFENDANT HAD COMPLIED WITH LOCAL RULE 7.

The Complaint was filed on January 21, 1966. (R. 4.) On February 8, 1966 plaintiff served defendant with 65 Interrogatories and 37 Requests for Admissions. (R. 15, 21.) Defendant obtained from plaintiff, on February 14, 1966, an extension of time until March 7, as to all of these matters. (R. 32.) On March 7 defendant filed a Motion to Dismiss on the ground that the Complaint failed to state a cause of action. (R. 34.) On the same day, defendant filed a Motion to Extend the Time within which the Interrogatories and Request for Admissions were to be answered to a date 10 days after the Court had ruled on the Motion to Dismiss. (R. 36.)

The Motion for Extension of Time stated the following grounds for the motion (R. 36):

> "This request for extension of time is made on the grounds and for the reasons that Plaintiff has submitted 64 Interrogatories to Defendant and 37 Requests for Admissions; that such Interrogatories and Requests for Admission require extensive research and time in obtaining the information with which to respond to such Interrogatories and Requests. That in the event the Motion to Dismiss of the Defendant should be ruled upon favorably to the Defendant by the Court, and Defendant believes and asserts that such Motion is meritorious, a requirement that the Defendant respond to the Interrogatories and Requests for Admissions prior to such a ruling by the Court would be unduly burdensome, expensive, and, in fact, a useless act."

On the same day that the Motion to Dismiss and the Motion to Extend Time for Answering the Interrogatories and Requests for Admission were filed, amended Local Rule 7 of the District Court of Idaho became effective. That rule provides, in effect, that any motion is to be accompanied by documentary support of the motion and a brief containing the reasons for the motion, along with ". . . points and authorities relied upon by the moving party." (R. 35.)

Plaintiff failed to oppose defendant's Motion to Extend Time within 5 days, as provided for in the Rule. (R. 35.) Rather, plaintiff waited 17 days, until March 24, when it filed a Motion to Compel Defendant to Answer the Interrogatories and to strike Defendant's Motion to Extend Time. (R. 39.) The Trial Court ruled on May 20 that defendant's Motion to Extend Time should be granted and that plaintiff's Motion of March 24 should be denied. (R. 65.)

Plaintiff's contention that a motion for extension of time to answer interrogatories and request for admissions is waived unless a separate brief is filed in support of the motion (Plaintiff's Brief, p. 5) is hypertechnical and absurd. No citation of " . . . points and authorities . . ." is necessary or appropriate to support such a motion to extend time, because the discretionary power of the court to grant such a motion, for cause shown, is universally recognized, and is specifically provided for by Rules 33 and 36 of the Federal Rules of Civil Procedure, which provide that on ". . . motion and notice . . ." the time to answer interrogatories and request for admissions may be extended. In addition, Rule 6(b) of the Rules provides that an extension of time may be granted ". . . with or without motion or notice . . ."

Furthermore, section (c) of Local Rule 7 specifically states that ". . .[*g*]*enerally,* motions shall be submitted and

determined upon the motion papers referred to, . . ." (emphasis supplied.) The rule does not say "in all cases", so as to require a brief to be filed when it would be a useless act.

The Trial Court found that defendant's motion for extension of time complied with Local Rule 7. "A court is, of course, the best judge of its own rules." *United States Fidelity and Guaranty Company* v. *Lawrenson*, 334 F. 2d 464, 467 (C. A. 4, 1964), *cert. den.* 379 U. S. 869. See to the same effect *Cunningham* v. *Schmidt, et al.*, 267 F. 2d 690 (C. A. D. C. 1959.)

V. THE TRIAL COURT WAS CORRECT IN TREATING DEFENDANT'S MOTION AS A MOTION FOR SUMMARY JUDGMENT SINCE THERE WAS NO GENUINE QUESTION OF MATERIAL FACT.

Plaintiff's Specifications of Errors 1, 2, 3, 4, 5, 6, 7, 9 and 12 challenge the propriety of the Trial Court's treatment of defendant's Motion to Dismiss as a Motion for Summary Judgment, under Rule 12(b) of the Federal Rules of Civil Procedure.

Plaintiff struggles, but in vain, to show that the decision on defendant's motion involved disputed questions of fact as to which (a) the controlling facts were not before the Trial Court and (b) the facts would have been brought out if defendant had been compelled to respond to plaintiff's Interrogatories and Notice to Admit Facts.

Inasmuch as the plaintiff has never disputed the fact that the sale in question was made to the Utah State Building Board, an instrumentality of the State of Utah, the first substantive question raised by defendant's motion—the sovereign exemption from § 2(a)—was a pure question of law.

As to the second substantive issue—whether the sale

was to an educational institution "for its own use"—the plaintiff's arguments are equally unavailing. The plaintiff states that the facts which it wished to bring before the Trial Court were ". . . the facts on competing facilities and other background facts. . . ." (Plaintiff's Brief, p. 6), the facts relating to ". . . the public use of the facilities." (Plaintiff's Brief, p. 13) and ". . . the full extent of public use of student union building facilities." (Plaintiff's Brief, p. 50.) The fact that the bowling lanes in the Student Union Building were made available to a limited extent for public use is clearly shown by the record. Any other "background facts" as to the use to which such facilities were put could not be determined from the defendant, in any event. The defendant merely sold the bowling lanes to the Utah State Building Board for installation in the Student Union Building. It did not thereafter operate them or have anything further to do with them.

Consequently, the case would be in no different posture whatever if the Trial Court had compelled the defendant to go through the useless procedure of responding to the plaintiff's discovery motions.

Nor is there any merit in plaintiff's contention that it was unable to show the amount or degree of public use of the bowling facilities at Utah State University. The Manager of the University Union Building, where the bowling lanes were located, stated in paragraph 5 of his affidavit, dated April 8, 1966, that of 129,349 lines bowled between July, 1964 and March 31, 1966, 2,934 lines were bowled by persons other than students, faculty, staff and guests of the University. (R. 94.) The six affidavits submitted by plaintiff (R. 55-64) confirmed the public use conceded by the Union Building Manager, thereby eliminating any fact issue as to whether the public used the bowling lanes.

With no issue of fact as to public use, the legal issue was

ripe as to the alternative contentions of the parties as to the meaning of § 13c: whether the words ". . . for their own use . . ." meant "for their own use" and not for resale, as contended by defendant, or whether the words meant "for their own use" and not for use by persons other than students, as contended by plaintiff. (Transcript of Oral Argument, pp. 24-25, 36.) This raised a purely legal issue.

There is still another compelling reason why the Trial Court was justified in passing upon the Motion for Summary Judgment without first permitting a factual inquiry into the degree of public use of the University bowling lanes. Neither the Interrogatories nor the Request for Admissions served upon defendant sought out information on the extent of public use of the bowling lanes and for good reason. Defendant's connection with the bowling lanes was limited to performing its contract to supply and install the lanes and related equipment. Therefore, even if the Trial Court had required defendant to answer the Interrogatories and had ruled that defendant admitted all the Requests for Admissions under a waiver theory, plaintiff would thereafter possess no more information concerning the extent of public use than it had on the date it filed its discovery motions.

The affidavits of Dee A. Broadbent (R. 92, 93) and Evan Stevenson (R. 94, 95) both dated April 8, 1966, filed with defendant's reply brief in connection with the Motion for Summary Judgment, put plaintiff on notice that information concerning the degree of public use of the bowling lanes was available in the records of the University.

Notwithstanding this notice, plaintiff elected not to move by affidavit under Rule 56(f) of the Federal Rules of Civil

Procedure dealing with opposition to a motion for summary judgment. That Rule provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

By filing an affidavit stating that essential facts concerning the degree of use of the bowling alleys were not presently known, but were available at the University, plaintiff might have persuaded the Trial Court to postpone ruling on the Motion for Summary Judgment. Having failed to take advantage of Rule 56(f), plaintiff is not now in a position to insist that the Trial Court failed to give plaintiff the opportunity to discover additional facts. The opportunity to discover further was never requested by plaintiff in the manner provided for in Rule 56(f).

Plaintiff elected to stand on the affidavits it filed in opposition to defendant's motion. Only one of such affidavits even attempted to raise an issue of fact as to the degree of public use of the University bowling lanes. It was the affidavit of Donald D. Kvarfordt, Manager of plaintiff. In his affidavit Mr. Kvarfordt stated (R. 57):

> "Watching the operation at the Union Building it appears most probable that records do not accurately separate or show student lineage from other bowling lineage."

That such a conclusory statement is entitled to no weight is clear from a reading of Rule 56(e) of the Federal Rules of Civil Procedure. The Rule provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as

> would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Affiant Donald Kvarfordt has no "personal knowledge" of the degree of public use of the University bowling lanes. His conclusory statement about the accuracy of the University records would not be admissible in evidence and his mere use of the University bowling lanes would not make him a competent witness on the question of the extent of public use. Therefore, his affidavit clearly fails to meet the standards required by Rule 56(e).

Furthermore, Rule 56(e) provides an alternative means for plaintiff to put in issue the question of public use of the University bowling lanes. Mr. Kvarfordt's affidavit could have been supplemented at plaintiff's option, by depositions, answers to interrogatories or additional affidavits. Plaintiff's failure to invoke Rule 56(e) supplies an additional reason why Specification of Errors 1 through 7, 9 and 12 have no merit.

For all of the reasons set forth above, there is no merit whatever in plaintiff's arguments that it was deprived of any opportunity to present additional facts which could

have been relevant or controlling on the issues raised by defendant's Motion for Summary Judgment.

Respectfully submitted,

ROBERT L. STERN,

MILES G. SEELEY,

NED ROBERTSON,
231 South LaSalle Street,
Chicago, Illinois 60604,
Attorneys for Defendant-Appellee.

RACINE, HUNTLEY AND OLSON,
Center Plaza Building,
Pocatello, Idaho.

MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604.

CERTIFICATE OF SERVICE.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules. I further certify that I mailed three copies of the above Brief of Defendant-Appellee by depositing three copies thereof, on the ..... day of November, 1966, with sufficient postage on the envelope in a United States Government mail receptacle addressed to the following:

JOHNSON AND OLSON,
L. CHARLES JOHNSON,
Attorneys for Appellant,
Box 1725,
Residence: Pocatello, Idaho.

.....
NED ROBERTSON,
Attorney.

APPENDIX A.

DEPARTMENT OF JUSTICE,

April 20, 1936.

SIR: Reference is made to your letter of April 4, 1936, in which you request my opinion as to whether "under the provisions of section 218 of the so-called Motor Carrier Act, 1935 (49 Stat. 543, 561; U. S. C., Title 49, Secs. 301-327), contract carriers by motor vehicles may quote lower rates to the Government than those prescribed in tariffs required to be filed with the Interstate Commerce Commission."

The Motor Carrier Act was enacted as an amendment to the Interstate Commerce Act (c. 1, U. S. C., Title 49), being designated as Title II thereof. The Act relates to and defines both common carriers by motor vehicle and contract carriers by motor vehicle. Section 218, which relates only to contract carriers by motor vehicle, requires that such a carrier shall file with the Interstate Commerce Commission schedules of its minimum charges for the transportation of passengers or property in interstate commerce, and provides that it shall not demand, charge, collect, accept, or receive for such transportation a less compensation than that contained in the schedules filed by it until such schedules have been modified or changed in the manner prescribed in the section.

It is a well-established rule of common law that the sovereign authority is not bound by a statute which tends to restrain or diminish its powers, right, or interest unless it is named therein. *United States* v. *Herron*, 20 Wall. 251; *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152. Judge Story in *United States* v. *Hoar*, 2 Mason 314, stated the rule in the following language:

"Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

If section 218 of the Motor Carrier Act is binding on the Government, it deprives the Government of a right, namely: the right to contract with contract carriers by motor vehicle for transportation at the lowest possible rate. Therefore, under the rule above stated the provisions of the section are not applicable to contracts with the Government unless made so, either expressly or impliedly, by the provisions of the Act.

I find no language in either the section itself or any other parts of the Act which makes the section applicable by express terms; nor is there, in my opinion, anything in the section which by necessary implication makes it applicable. It will be noted, however, that section 217 of the Act, which relates to common carriers by motor vehicle and provides that such a carrier shall not charge for transportation in interstate or foreign commerce a higher or a lower rate than that contained in its schedules on file with and approved by the Interstate Commerce Commission, contains the following proviso:

"*Provided*, That the provisions of sections 1 (7) and 22

(1) of this title shall apply to common carriers by motor vehicles subject to this chapter."

The reference to Title I is to the Interstate Commerce Act as it existed prior to the enactment of the Motor Carrier Act as an amendment thereto, and section 22 (1) of that Act, which relates to the provisions governing rates which may be charged by carriers by rail and water, provides in part:

"Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, * * *."

The express exemption of Government contracts from the provisions of section 217, and also from the general provisions of the Interstate Commerce Act, and the absence of express exemption of such contracts from the provisions of section 218 raises the question whether under the maxim *expressio unius exclusio alterius* the provisions of section 218 are by necessary implication made applicable to such contracts.

The maxim *expressio unius exclusio alterius* "expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent * * *." *United States* v. *Barnes*, 222 U. S. 513, 519. "Great caution is requisite in dealing with it * * *. It is often a valuable servant, but a dangerous master * * * and * * * ought not to be applied, when its application * * * leads to inconsistency or injustice." *Ford* v. *United States*, 273 U. S. 593, 612. "It is not of universal application, and when to apply it would be to defeat the accomplishment of the manifest purpose of the act, and to prevent the attainment of the end for which the act was passed, we certainly must decline to be governed by it." *City of New York* v. *Davis*, 7 F. (2d) 566, 575. It is never applied when that which is expressed is merely declaratory of existing law; but only when it is creative of new law, or in derogation of

existing law. *Straus* v. *Yeager,* 48 Ind. App. 448; 93 N. E. 877, 881; *Yardley & Co., Ltd.* v. *United States,* 22 C. C. P. A. 390; *Barbat* v. *Allen,* 7 Exch. 608; Sutherland on Statutory Construction, 2d Ed., section 491; Maxwell on Interpretation of Statutes, pp. 547, 548. It is never invoked when to do so would contradict the public policy of the sovereign. *Forsythe* v. *Paschal,* 34 Ariz. 380; 271 Pac. 865.

The exemption of contracts with the Government from the provisions of section 217 and Title I of the Act does not create any new law. Such contracts would be exempt without any express statement in the Act to that effect. The exemption is therefore merely declaratory of the law as it already existed, and is not creative. Moreover, to apply the rule in this case, thereby making the provision of section 218 applicable to contracts with the Government, would not only be in derogation of the rights of the Government, but would also be contrary to the public policy of the United States as expressed by the Congress in various statutes requiring that all Government contracts, except in cases of emergency, be let to the lowest responsible bidder after proper advertising. This policy of the Government with respect to contracts is not to be lightly passed over, and certainly it should not be cast aside unless the Congress by clear expression so directs.

The purpose of the Motor Vehicle Act, expressly stated therein, is to regulate transportation by motor carriers in such manner as to foster, promote, and protect interstate and foreign commerce by motor carriers, and to prevent in connection therewith unreasonable charges and unjust discriminations resulting in undue preferences or advantages and unfair or destructive competitive practices. It is not necessary for such purposes that section 218 be binding upon the Government. The unreasonable charges, unjust discriminations, undue preferences, and unfair destructive competitive practices sought to be prevented relate entirely

to private shippers. As was said by the Supreme Court in *Nashville Ry.* v. *Tennessee*, 262 U. S. 318, 323, in discussing the analogous requirements contained in the Interstate Commerce Act, "the grant of a lower rate * * * to a government * * * may benefit the government without subjecting to prejudice any person, locality or class of traffic." Again, in *Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415, 425, the Court, discussing the same principle as related to telegraph rates, said:

"It may be doubted whether the prescribed rule requiring equality of treatment would ever be violated by giving to the Government provisional rates."

Moreover, to hold that section 218 is applicable to Government contracts would give rise to an inconsistency. One of the expressed purposes of the act is to prevent unjust discrimination. It would indeed be an anomaly to hold that the Congress intended to make the general purposes of the Act, including the purpose to prevent *unjust discrimination*, relate to contracts with the Government as well as to contracts with private shippers, and also to hold that it intended by section 218 of the act to deny to contract carriers by motor vehicle the same freedom in making contracts with the Government that common carriers by motor vehicle are, under the proviso in section 217, expressly permitted to enjoy. Such a paradox should not be assumed from the mere fact that the Congress in section 217 and Title I of the Act inserted a provision which was merely declaratory of existing law.

It is my opinion, therefore, that the provisions of section 218 do not apply to contracts with the Government, and that contract carriers by motor vehicle may quote to the Government lower rates than those contained in their schedules on file with the Interstate Commerce Commission.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

APPENDIX B.

DEPARTMENT OF JUSTICE,

December 28, 1936.

SIR: I have your letter of October 30, requesting my opinion concerning the application of the Robinson-Patman Act (approved June 19, 1936, c. 592, 49 Stat. 1526) to government contracts for supplies.

The statute reads, in part, as follows:

"Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended to read as follows:

"SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities *of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce,* where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:* Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery re-

sulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *." [Italics supplied.]

Aside from the proviso, the above quoted portion of the statute differs from Section 2 of the Act of October 15, 1914, in no respect save as indicated by the underscored words, which did not appear in the earlier statute. The language of the proviso is different from that of the corresponding proviso in the earlier statute, but the change does not bear upon the question which you have submitted.

In my opinion of April 20, 1936 [38 Op. 452], to the Secretary of War concerning contracts with motor vehicle carriers, it was pointed out that statutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. As Mr. Justice Brandeis observed in *Emergency Fleet Corporation* v. *Western Union Telegraph Company*, 275 U. S. 415, 425, "it may be doubted whether the prescribed rule requiring equality of treatment would ever be violated by giving to the Government preferential rates."

The Act of June 19, 1936, merely amended the Act of October 15, 1914, as above pointed out, and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts. The practice in this respect indicates that it has been customary in the past for those dealing with the various agencies of the Federal Government to grant to them special prices on contracts for supplies. Such prices are often below the regular market for similar material supplied to the regular trade—due, perhaps, to an estimated lower cost of doing business with the Government because of quantity purchases and absence of credit risk, solicitation expense, etc., although it may often be impossible to evaluate such factors with exactness.

It has been suggested that the force which would ordinarily be attributed to this practice may be weakened because of the probability that the prices named have seldom, if ever, violated the statute, even assuming its application. Perhaps this is true. It is also conceivable that if the past practice is maintained the prices hereafter named to the Government will seldom, if ever, violate the amended statute, likewise assuming its application; and this would seem to supply another reason for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters, in the absence of any clear indication that it intended to depart from that policy in this instance.

It is therefore my opinion that the Act of October 15, 1914, as amended by the Act of June 19, 1936, is not applicable to Government contracts for supplies.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

Mr. Lloyd. Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

Mr. Teegarden. Not unless the present Clayton Act does so. So far as that problem is concerned, it is no different from that which exists under the present Clayton Act.

Mr. Lloyd. For instance, the Government gets huge discounts. Take that electric fan, for instance. You go to the ordinary store and the list price is $35. The Procurement Division procures them delivered, one at a time, for $13.18. Now, would that discount be barred by this bill?

Mr. Teegarden. I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns. Therefore a discrimination—it is so applied universally in interstate commerce law, in the railroad law—to have a discrimination, there must be a relative position between the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.

In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.

The Federal Government is saved by the same distinction, not of location but of function. They are not in competition with anyone else who would buy.

Mr. Hancock. It would eliminate competitive bidding

all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden. You mean competitive bidding on Government orders?

Mr. Hancock. Government, State, city, municipality.

Mr. Teegarden. No; I think not.

Mr. Michener. If it did do it, you would not want it, would you?

Mr. Teegarden. No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

Mr. Hancock. You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

Mr. Teegarden. No.

Mr. Hancock. Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

Mr. Teegarden. I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere.

The facts of the situation are not present upon which to predicate a discrimination, in the nature of the case. I do not see that that question becomes any different under this bill from what it is under the present section 2 of the Clayton Act, for that bill also prohibits discrimination generally in the same terms that this does. But it differs in the breadth of the exceptions. That is the only difference between the two bills.